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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 653

GLOBE SLICING MACHINE CO., INC. and LEWIS NOVOTING,

Petitioners,

against

ROLF K. HASNER,

Respondent,

and

ASTRID SIVERTSEN,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Questions Presented

Should this Court consider:

1. Whether, in the particular circumstances here presented, the Court of Appeals was correct in refusing to reverse, on the ground that issues of fact were present, a summary judgment rendered in the District Court on petitioners' express representation to that court that no facts were disputed, and

2. Whether the issues of fact now suggested by plaintiffs are, in any event, irrelevant under applicable New York law?

Statement of the Case

Petitioner Novoting (plaintiff below) is a citizen of the State of New York (83, 91)*. Petitioner Globe Slicing Machine Co., Inc. (hereinafter "Globe," also plaintiff below) is a New York corporation with its principal place of business in Connecticut (83, 91). Respondent Hasner (defendant below) is a citizen of the Kingdom of Norway (83, 91). Astrid Sivertsen, originally named as defendant, was never effectively served with process, and on consent of all the other parties the action was dismissed as against her (83, 91). Jurisdiction is based on diverse citizenship, and New York law applies.

Petitioners seek a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit unanimously affirming a summary declaratory judgment of the United States District Court for the Southern District of New York which construed a by-law of a close corporation restricting the sale or disposition of its shares. Petitioners rely primarily on the assertion that summary judgment was improper because issues of fact were present. This position is flatly contrary to their position in the District Court.

From the record it appears that Peter Sivertsen died in October 1962 owning 136 shares of Class A Common Stock of Globe (4). Mrs. Sivertsen owns 97 shares of Class B Common Stock of Globe (4). Mr. Novoting owns 107 shares of Class A Common Stock and 127 shares of Class B Common Stock (4, 153). The Class A Common Stock has the exclusive right to vote for directors; the two classes have equal voting rights on all other questions (4).

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*Numbers in parentheses refer to page numbers of Joint Appendix printed for the use of the Court of Appeals.

Upon Mr. Sivertsen's death, petitioners invoked a by-law of Globe which provided that no "sale or disposition" of Globe's shares should take place until the shares had first been offered to Globe and to its shareholders. Petitioners asserted that this by-law applied to transfers consequent upon death. They sought to compel Mr. Hasner, Mr. Sivertsen's executor, to offer the decedent's shares to them pursuant to the alleged intendment of the by-law, and to restrain Mr. Hasner from otherwise selling, assigning or transferring the shares (25, 26). Mr. Hasner counterclaimed for a declaration that he was the owner of, and was entitled to vote, the shares (37). Other issues relating to the validity of certain provisions of Globe's charter and by-laws were present, but the decision of the District Court on those issues in Mr. Hasner's favor has been conceded to be correct.

After extensive depositions and other discovery proceedings in which the facts surrounding this action were explored at length, petitioners moved for summary judgment. Mr. Hasner cross-moved for summary judgment in his favor.

Petitioners' motion was denied. Although they contended in the Court of Appeals that their motion should have been granted, that contention does not seem to be made here.* The sole issue remaining is whether the District Court erred in granting respondent Hasner's motion.

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*If it is, it is clearly misconceived. As petitioners correctly indicated (Petition, page 15), the mere fact that cross-motions for summary judgment were made does not establish the propriety of deciding the case on summary judgment, for there may be issues of fact which relate to one motion but not the other. Such is the case here. In his papers opposing petitioners' motion for summary judgment, respondent Hasner presented evidence that several transfers had, in fact, been made without regard to the provision of the by-law (74-78). Additionally, Mr. Hasner presented evidence that Josephine Novoting, petitioner Novoting's former wife, had died in September 1958 owning 127 shares of Globe's Class B common

Argument

POINT I

THE DECISION BELOW IS CLEARLY CORRECT, AND HAS NO IMPLICATIONS BEYOND THIS CASE.

Globe is a New York corporation. Among its by-laws is one which provides that ". . . no sale or disposition of any shares [of Globe] . . . by any stockholder shall be valid unless . . ." such shares be first offered to Globe and to its remaining shareholders on a formula basis. The only substantive question presented in this case is whether this language applies to transfers consequent upon the death of a shareholder. The courts below held, on summary judgment, that as a matter of law under New York law it did not.

This decision is in complete accord with the law of the State of New York as declared by its appellate and lower courts. *Lane* v. *Albertson*, 78 App. Div. 607, 79 N. Y. Supp. 947 (Appellate Division 2d Dep't 1903); *Storer* v. *Ripley*, 12 Misc. 2d 662, 178 N. Y. S. 2d 7 (Supreme Court N. Y. Co. 1958). The language of the by-law involved herein (". . . no sale or disposition of any shares . . . by any stockholder shall be valid unless . . .") is strikingly similar to the language in *Storer* v. *Ripley* (stock "shall not be sold, signed [*sic*], transferred or hypothecated

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stock (86, 91, 136), and that Mr. Novoting had procured a decree of the Surrogate's Court authorizing him to retain these shares without offering them to Globe or to his fellow shareholders in accordance with the provisions of the by-law (86, 91, 151-153). These facts tend to show either that the by-law has been abandoned or that petitioner Novoting has himself construed the by-law as not applying to transfers consequent upon death. In the face of such evidence it would have been obviously improper for the court to have granted petitioners' motion for summary judgment.

. . ."), and in *Lane* v. *Albertson* ("no member of the association, nor his executors, administrators or other legal representatives, shall sell or transfer any of the capital stock . . ."), and should be given the same effect.

Moreover, although it is said in the Petition that the result of the decision below is to force on petitioner Novoting partners not of his own choosing, contrary to the intention of the parties in adopting the by-law, the express terms of the by-law permitted stockholders to terminate the restriction in their uncontrolled discretion upon six months' notice given after June 30, 1937 (some seven years after its adoption). This provision demonstrates that the by-law could not conceivably have been intended to provide each stockholder with a continuing veto on sales proposed to be made by fellow stockholders, as petitioners now contend.

Further, the provision authorizing termination and the facts which indicate that advantage was taken of it furnish an additional basis for the declaratory relief granted by the District Court. Even petitioners conceded below that Mr. Sivertsen's stock vested by operation of law at his death in his executor, Mr. Hasner. Mr. Hasner was therefore entitled to exercise with respect to the stock at least those rights which his testator could have exercised. As the record shows, he duly served on his fellow shareholders the notice of termination provided for in the by-law (78-79). Even if, therefore, as petitioners contend, the by-law applies to transfers consequent upon death, Mr. Hasner has withdrawn Mr. Sivertsen's stock from the ambit of the by-law provisions and is now free to proceed without regard to them.*

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*This result would obtain even in states which, unlike New York, construe general restrictions of this sort as applying to transfers consequent on death. *Kentucky Package Store, Inc.* v. *Checani*, 331 Mass. 125, 117 N. E. 2d 139 (1954).

It appears from the foregoing that the decision below was correct and, in any event, involves only questions of local law and of the effect under that law of a particular instrument. There is nothing in the case calling for review by this Court.

POINT II

THERE IS NO CONFLICT OF DECISION.

The decision of the Court of Appeals for the Second Circuit is not even claimed to conflict with any decision of this Court or of any other appellate court. The only decision asserted to conflict with the decision below is a decision of the United States District Court for the Eastern District of New York, *Matthews* v. *United States,* 226 F. Supp. 1003 (E. D. N. Y. 1964).

The *Matthews* case is not in conflict with the decision of Judge Lumbard. Indeed, it squarely supports it. In the *Matthews* case, the court construed a shareholders' agreement providing that no party should sell, transfer or assign his shares *except to lineal descendants* without first offering them to the other parties to the agreement. A shareholder died, leaving his shares to his son and to his widow, without offering them as provided in the agreement. Consonant with the *Storer* and *Lane* cases, the court held, on a motion for summary judgment, that the executors had no legal duty to offer the shares to the surviving parties to the shareholders' agreement, and that they were entitled to distribute the shares to the widow, who was obviously not a lineal descendant and who could not have taken, in the absence of such offer, if the language of the agreement applied to transfers consequent on death. This case is therefore squarely in line with the decision below and the New York state court cases.

The court in *Matthews* did hold that the legatees could not make *inter vivos* distribution of the shares other than to the lineal descendants without first making the offer contemplated by the shareholders' agreement. This question is not present in this case. It can arise only if and when Mrs. Sivertsen (Mr. Sivertsen's sole legatee) decides to dispose of her shares otherwise than by will or intestacy.*

POINT III

THE SUMMARY JUDGMENT PROCEDURE WAS PROPERLY USED BELOW.

Petitioners assert at page 4 of their Petition that the rights of the parties were determined "without [petitioners'] having had the opportunity to present evidence in a trial as to the intent and purpose of the by-law." This is clearly untrue. Petitioners had every conceivable opportunity to present evidence. They choose not to. They made no request for a trial on the issue of the proper construction of the by-laws. They never objected to use of the summary judgment procedure. In fact, they affirmatively represented to the District Court that there were no facts which could be the subject of a hearing.

The District Court has for some years included in its local rules, as General Rule 9(g), a requirement that the moving party in a motion for summary judgment specify the facts which he deems undisputed. Rule 9(g) further requires that the party opposing the motion specify the facts which he claims are in dispute. Pursuant to the rule, respondent Hasner filed a statement in support of his motion, setting forth the facts on which he relied (83-89). In response, petitioners filed a statement in which they expressly

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*It may well not arise even then. See *supra*, p. 5.

admitted that there was no issue of fact with respect to any of the matters on which respondent Hasner relied (91). Petitioners there said:

> "Plaintiff agrees with defendant that there exists no genuine issue to be tried with respect to [any of] the items . . . in defendant's Statement of Undisputed Facts pursuant to Rule 9(g)."

Moreover, petitioners did not suggest any new facts which might be the subject of a trial. Instead, at page 3 of petitioners' Reply Memorandum in opposition to respondent Hasner's motion, petitioners stated:

> "Plaintiffs' objection to defendant's motion does not dispute facts . . . ."

Because no issue of fact was raised in the District Court, and in fact the parties affirmatively represented to the court that no such issue existed, the District Court was clearly correct in granting summary judgment. *Kaz Mfg. Co.* v. *Chesebrough-Pond's, Inc.*, 211 F. Supp. 815, 819-20 (S. D. N. Y. 1962), aff'd. 317 F. 2d 679 (2d Cir. 1963).

At this late date petitioners seek to change their ground. They point to provisions of an agreement entered into January 25, 1930, and rescinded some three months later. These provisions, as petitioners accurately state at page 8 of their Petition, were not called to the attention of the District Court. Petitioners now assert that this belatedly introduced evidence raises a question of fact which should now be considered. Why petitioners failed to direct the District Court's attention to the agreement can only be a matter of speculation. Clearly petitioners were familiar with the agreement; it was signed by petitioner Novotny himself, and a part of the same agreement was referred

to in the affidavit of Richard Hawkins in support of respondent Hasmer's motion (98-103). Perhaps petitioners concluded that only unfavorable inferences could be drawn from the fact that the shareholders of Globe rescinded the agreement containing the language on which they now rely while leaving in effect the very different provisions of the by-law construed below.

In any event, having made a deliberate choice, petitioners should in these circumstances not be permitted to change their ground after having sought and obtained decisions from both the District Court and the Court of Appeals. Petitioners cannot be sustained in their contention that they are entitled or should be permitted belatedly to submit evidence which has long been available to them. The courts have repeatedly held that a party who raises no issue of fact before the district court cannot later be relieved of an adverse judgment on the ground that such issues were present. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 635 (1953); *Home Indemnity Co.* v. *Williamson*, 183 F. 2d 572, 576 (5th Cir. 1950); *Ring Engineering Co.* v. *Otis Elevator*, 179 F. 2d 812 (D. C. Cir. 1950); *Kahle* v. *Amtorg Trading Corp.*, 13 F. R. D. 107 (D. N. J. 1952).

The *Kahle* case arose on a motion to be relieved of a final judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The facts of that case concerning the nature of the evidence sought to be introduced by plaintiffs after summary judgment was rendered against them are much like the facts at bar. Holding that plaintiffs were not entitled to the relief they sought, the court said:

> "The provisions of Rule 12(c), supra, were invoked by the plaintiffs and, notwithstanding the cross-motion for summary judgment filed by the defendant, they elected to proceed on the record made

> at the hearing. We may assume, in the absence of evidence to the contrary, that this was a deliberate election made on the advice of counsel. It is our opinion that under the circumstances the plaintiffs may not be relieved of an adverse judgment on their representation that they are in possession of additional evidence which they thought 'was of no importance or relevance' when the motion was argued. If summary judgments are vacated on such tenuous grounds they will lack finality and the very purpose of Rule 56, supra, will be defeated. There will be no end to litigation." 13 F. R. D. at 108.

Moreover, it is established law that the appellate court is bound by the record before it. It cannot receive extrinsic evidence to explain the record, to supplement it, or to contradict it. *Frank Fehr Brewing Co.* v. *Clarke,* 268 F.2d 170, 183 (5th Cir. 1959), *cert. denied,* 362 U.S. 963 (1960). It is, in fact, "inappropriate" for an appellate court

> "to reverse the trial court on the basis of facts not incorporated in the record which the trial court considered at the time of its decision." *Creamette Co.* v. *Merlino,* 289 F.2d 569, 570 (9th Cir. 1961).

POINT IV

THE CLAIM OF INFRINGEMENT OF CONSTITUTIONAL RIGHTS IS MOOT.

Petitioners claim that the injunctive provisions in the judgment of the District Court violate their constitutional rights. The language of which petitioners complain restrained them "from taking any action . . . to interfere

with the exercise by defendant Hasner of his rights, as such rights are herein declared . . . ." The Court of Appeals agreed with petitioners that this language was too broad. It remanded the matter to the District Court for this reason, among others. The District Court has amended its judgment, eliminating the language of whch petitioners complain. The amended judgment is reprinted *infra,* pp. 1a-2a. The question raised by petitioners in this regard is, therefore, moot.

POINT V

THERE WAS NO IMPROPER DENIAL OF A HEARING ON THE INJUNCTIVE PROVISIONS OF THE JUDGMENT.

In the Court of Appeals, the plaintiffs had raised a different question concerning the injunction. They contended that a separate hearing was necessary on the question of injunctive relief. The facts relating to this problem were as follows:

On November 19, 1963, Judge Murphy in the District Court issued an opinion in which he stated that Mr. Hasner was the owner of and was entitled to vote the shares formerly held by Mr. Sivertsen (187-94). Within hours thereafter, Mr. Novoting unilaterally caused to be transferred from the treasury of Globe to himself 50 additional Class A common shares. He never obtained the approval of the Board of Directors of Globe for this transfer (196-97). It is clear under New York law [Business Corporation Law § 504(e)], that the transfer of the shares from the treasury of Globe without director approval is void. Prior to the entry of judgment these facts were, by affidavit of Mr. Hasner, brought to the attention of the District Court

(196-97), and that court, at Mr. Hasner's request (198), entered the injunction now complained of forbidding the voting of the shares so transferred.* Although Mr. Novoting was given an opportunity to present—and did present—a brief (202-05) and affidavit in opposition to the form of the judgment, he never disputed the operative facts. He does not dispute them even now, nor does he suggest any additional facts which under New York law would have relevance.

Accordingly, a hearing could have served no conceivable purpose, and Mr. Novoting's contention that a hearing was required is completely without merit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

December 4, 1964.

Respectfully submitted,

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*Other injunctive provisions have now been eliminated. See p. 11 *supra*.